

FILED BY CLERK

JAN -8 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0079
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOHNNY LEE ARCHIE,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081083

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes

Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Johnny Archie was convicted of aggravated assault. On appeal, Archie argues the court's jury instructions on the elements of aggravated assault were insufficient. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In March 2008, Archie was involved in an automobile collision with G. in Tucson. G. was injured in the accident; he apparently was dazed when he got out of his sport utility vehicle. Archie got out of his car, yelling and screaming, and the two men exchanged words. Archie then hit G. three times in the face, fracturing his jaw and breaking some of his teeth.

¶3 Archie was charged with aggravated assault causing temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part. The jury found him guilty as charged and the trial court sentenced him to an enhanced, mitigated prison term of three years. This appeal followed.

Discussion

¶4 Archie contends the trial court did not instruct the jury adequately on the elements of aggravated assault. Because he did not object below, however, we review this claim only for fundamental error. *See State v. Simpson*, 217 Ariz. 326, ¶ 12, 173 P.3d 1027, 1029 (App. 2007). Under this standard of review, the defendant bears the

burden of showing the error was fundamental and that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).¹ We will not find error with respect to jury instructions reversible unless “a jury would be misled by the instructions when taken as a whole.” *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007).

¶5 Archie maintains that because “the court’s aggravated assault instruction did not define simple assault . . . the instruction did not inform the jury that [he] must have intentionally, knowingly, or recklessly caused [G.]’s physical injuries.” He asserts “the jury could have convicted [him] without finding a culpable mental state.” We disagree. In its final instructions, the trial court advised the jury that “[t]he crime of aggravated assault requires proof . . . [t]he defendant committed an assault.” And, although the court did not immediately follow that instruction with an instruction defining assault, the court subsequently instructed the jury on the elements of assault, including the requirement that the state prove the defendant “intentionally, knowingly or recklessly caused physical injury to another person.” Taken as a whole, the instructions “correctly reflect[ed] the law” with respect to the elements necessary to convict Archie of aggravated assault. *Id.* ¶ 15. We find no reversible error in the court’s instructions.

¶6 Archie nevertheless argues the jury “would not necessarily have proceeded to read the simple assault instruction” and “would not necessarily [have] conclude[d] that the simple assault definition was the same assault that the aggravated assault instruction

¹Error is fundamental if it goes “to the foundation of the case . . . [or] takes from the defendant a right essential to his defense.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

referred to.” But, the trial court instructed the jury that it was required to consider all of the instructions, and we presume jurors follow the instructions they are given. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). And both the aggravated assault instruction and the subsequent definition of assault referred to “assault,” not “simple assault.” Moreover, “[m]ere speculation that the jury was confused is insufficient to establish actual jury confusion.” *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994). Archie has not sustained his burden of establishing he was prejudiced by any error in the instructions.² *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Disposition

¶7 For the reasons stated above, we affirm Archie’s conviction and sentence.

GARYE L. VÁSQUEZ, Judge

²Furthermore, “the prejudice stemming from an unobjected-to error must be analyzed in light of the entire record.” *Gallegos*, 178 Ariz. at 11, 870 P.2d at 1107. Here, Archie conceded at trial that he had committed assault, arguing only that there was “no way to conclude beyond a reasonable doubt that he was the one that caused the injuries.” In his opening brief, Archie similarly stated, “The issue at trial was whether the accident or the three punches caused the injuries” Given such a posture, it is difficult to see how any defect in the court’s instruction on assault as an element of aggravated assault could have been prejudicial. And although Archie subsequently contended in his reply brief that “there was . . . evidence that the event occurred during a black out following the impact from the accident,” we do not address arguments raised for the first time in the reply brief. *See State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005).

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge